



**Mwakondo & 6 others v Kudoka & 4 others (Environment & Land Case  
261 of 2004) [2022] KEELC 2934 (KLR) (29 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 2934 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 261 OF 2004**

**NA MATHEKA, J**

**JUNE 29, 2022**

**BETWEEN**

**JUMA MBWANA MWAKONDO ..... 1<sup>ST</sup> PLAINTIFF  
FOSI HAMISI MWARANDU ..... 2<sup>ND</sup> PLAINTIFF  
HASANI JUMA MWAVIDEMU ..... 3<sup>RD</sup> PLAINTIFF  
JUMA MOHAMED KIZURI ..... 4<sup>TH</sup> PLAINTIFF  
ALFANI BABU MAJENI ..... 5<sup>TH</sup> PLAINTIFF  
BABU ALI ..... 6<sup>TH</sup> PLAINTIFF  
BAKARI YUSUF MASEMO ..... 7<sup>TH</sup> PLAINTIFF**

**AND**

**MWINYIFAKI ALI KUDOKA ..... 1<sup>ST</sup> DEFENDANT  
ABDALLA JUMA BEMPA ..... 2<sup>ND</sup> DEFENDANT  
SWALEH RAMA DZOGGOLLOH ..... 3<sup>RD</sup> DEFENDANT  
ALI MOHAMMED RAMADHAN (THE LEGAL REPRESENTATIVE OF THE  
ESTATE OF RAMADHAN ABDALLA KUDOKA, ATHUMAN ABDALLA  
KUDOKA AND BABU KUDOKA) ..... 4<sup>TH</sup> DEFENDANT  
LAND REGISTRAR ..... 5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

1. The plaintiffs aver that they have developed residential houses on plot No 123 section i mainland south and aver that they have been residing on the said land for well over 30 years. The plaintiffs aver that no title deed has been issued in respect of the above stated parcel of land and that if any exists, the



plaintiffs state that the same has been unprocedurally obtained by the defendants after this suit was filed. The plaintiffs aver that the title deed was unprocedurally and fraudulently obtained with the full knowledge and assistance of the 5<sup>th</sup> defendant. The particulars of fraud are applying for a title deed without disclosure of the plaintiffs' interests in the suit land. Applying for the title deed without disclosing the occupation by the plaintiffs on the suit land. Failing to disclose in their defence that there existed no title deed at the time when the suit was filed. Obtaining the title deed whereas this suit was still pending. Failing to disclose to the land registrar of the fact that, adjudication had not been carried out. The plaintiffs aver that due to the foregoing, the title deed issued on July 6, 2005 is tainted with illegality and shall pray that the same should be cancelled. That the defendants have from time to time alleged that the said plot No 123 section i mainland south belonged to one Ali Abdalla Kudoka, who passed away on April 23, 1988 or thereabout. After the demise of the said Ali Abdalla Kudoka, the defendants purported to be owners of the aforesaid property and begun to file cases against some of the plaintiffs in the Resident Magistrate's court at Mombasa demanding payment of ground rent for the aforesaid plot. The plaintiffs do not recognize the defendants as the owners of the aforesaid property and insist that they are under no obligation to pay any ground rent to the defendants or any other person and further aver that they have acquired the rights under adverse possession to occupy and own the particular parcels of land on which they have developed their houses. The plaintiffs pray for judgment against the defendants for;

1. A declaration that the defendants are not the lawful owners of plot No 123 section i mainland south and that they have therefore no capacity to demand and/or collect any ground rent from the plaintiffs.
  2. An order of injunction to restrain the defendants by their servants and/or agents from demanding and / or collecting any ground rent from the plaintiffs.
  3. An order that the aforesaid plot No 123 section i mainland south be surveyed and subdivided to give each plaintiff a title for the portion occupied by their respective houses upon payment of the requisite charges.
  4. Costs of this suit.
  5. An order that the title deed issued to the defendants in respect of plot No 123 section i mainland south be cancelled forthwith.
2. The 1<sup>st</sup> defendant, Ramadhan Abdallah Kudoka avers in the statement of defence and counterclaim that title to the parcel of land has been issued and registration records will show that one Abdalla Ali Kudoka has always been the registered owner since the colonial times. They state that plot No 123/IMS, Mombasa belongs to Ali Abdalla Kudoka (deceased) who died on the July 12, 1988 and further states that letters of administration have been granted by the High Court of Kenya in respect of the estate of the said Ali Abdalla Kudoka (deceased) The defendant avers that it is true that he has filed suits against some of the plaintiffs in the Resident Magistrate's Court demanding arrears of ground rents which he is entitled to the said ground rents from the plaintiffs, the 1<sup>st</sup> defendant states that he is a lawful owner of the parcel of land by virtue of being the administrator of the estate of Ali Abdalla Kudoka.
  3. By a verbal agreement reached between the plaintiffs' and/or relatives with the registered properties of the land parcel No 123/IMS, the late Ali Abdalla Kudoka it was agreed that the plaintiffs' parents and their children would occupy parts of parcel of land and pay rent. The plaintiffs' parents paid rent but sometime in the year 1995/2003 and thereafter they refused to pay rents. By refusing to pay rents the



plaintiffs became in breach of the tenancy agreement. The 1<sup>st</sup> defendant in the counter-claim claims for vacant possession of the suit premises known as plot No 123/I MS Mombasa.

4. This court has carefully considered the evidence and submissions therein. The defendants were served but failed to attend court and adduce any evidence. The *Land Registration Act* is very clear on issues of ownership of land and section 24(a) of the *Land Registration Act* provides as follows:

“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

section 26 (1) of the *Land Registration Act* states as follows:

“The certificate of title issued by the registrar upon registration ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner... and the title of that proprietor shall not be subject to challenge except –

- a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or
- b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

5. The law is clear that, the certificate of title issued by the registrar upon registration shall be taken by all courts as *prima facie* evidence that the person named as proprietor of the land is the absolute and indefeasible owner and the title of that proprietor shall not be subject to challenge except – On the ground of fraud or misrepresentation to which the person is proved to be a party; or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
6. This court in considering this matter referred to the case of *Elijah Makeri Nyangw'ra v Stephen Mungai Njuguna & Another* [2013] eKLR where the court held that the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme. The court in the case while considering the application of section 26(1) (a) and (b) of the *Land Registration Act* rendered himself as follows:-

“-----the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.”

7. It is not in dispute that the Ramadhan Abdalla Kudoka is the registered owner of the suit property plot No 123 section i mainland south. The plaintiffs aver that the title deed was unprocedurally and fraudulently obtained with the full knowledge and assistance of the 5<sup>th</sup> defendant. That the defendants applied for a title deed without disclosure of the plaintiffs' interests in the suit land as they were in occupation of the suit land. No title deed had been issued at the time when the suit was filed and adjudication had not been carried out. The plaintiffs aver that the title deed issued on July 6, 2005 is tainted with illegality and shall pray that the same should be cancelled. That the defendants are neighbours and had been appointed Ali Abdalla Kudoka a caretaker to collect land rent and pay to the municipal council at that time. That they are 10 families on the suit land who are the beneficiaries and have been there for over 30 years. This court has perused the documents adduced as exhibits and indeed find that this suit was filed in 2004. The title deed for the suit land was issued July 6, 2005, Ali Abdalla Kudoka (deceased) who died on the July 12, 1988 and this was not disputed. On the



November 28, 2007 a title of the same suit property was issued to Ramadhan Abdalla Kudoka the administrator at that time of the estate of Ali Abdalla Kudoka. The defendants on record now are the sons of the deceased who have obtained letters of administration limited to assets left unadministered by the administrator dated April 13, 2018.

8. From the evidence adduced which has not been challenged I find that the title of the suit property was obtained through fraud and/or misrepresentation to which the defendants were a party. The first registration was done on July 6, 2005 when Ali Abdalla Kudoka (deceased) who was the registered proprietor died on the July 12, 1988. It was also done when this matter was already in court and the defendants were aware of the dispute. I find that the plaintiffs have proved their case on a balance of probabilities and grant the following orders;
1. A declaration that the defendants are not the lawful owners of plot No 123 section i mainland south and that they have therefore no capacity to demand and/or collect any ground rent from the plaintiffs.
  2. An order of injunction to restrain the defendants by their servants and/or agents from demanding and / or collecting any ground rent from the plaintiffs.
  3. An order that the title of the suit property plot No 123 section i mainland south be cancelled and the suit land be surveyed and subdivided to the plaintiffs as per the portions occupied by their respective houses upon payment of the requisite charges.
  4. Costs of this suit to the plaintiffs.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 29<sup>TH</sup> DAY OF JUNE 2022.**

**N.A. MATHEKA**

**JUDGE**

